

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JIM ENNIS and
CHILTON L. ENNIS,**

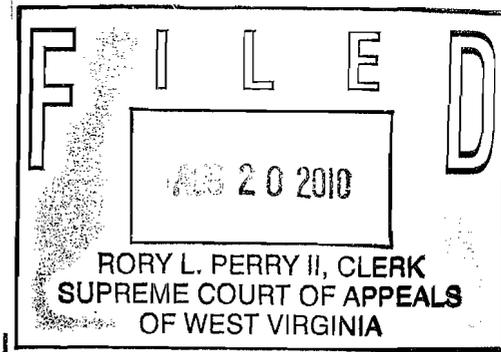
Appellants/Plaintiffs Below,

v.

**DOCKET NO.: 35512
CIVIL ACTION NO. 08-C-1179
Circuit Court of Kanawha County
Charles E. King, Judge**

**SAM WOODS, dba ADVANTAGE
HOME & ENVIRONMENT INSPECTIONS, INC.**

Appellee/Defendant Below.



**RESPONSE BRIEF
OF
APPELLEE, ADVANTAGE HOME AND ENVIRONMENT INSPECTIONS, INC.**

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I. KIND OF PROCEEDING AND NATURE OF RULINGS IN THE LOWER TRIBUNAL.

In their Complaint filed on or about July 16, 2008, Appellants alleged that they were induced to purchase certain real estate from Defendants Anderson, Currey, and Currey Realty who provided to Appellants certain reports of inspections of the subject property prepared by Appellee Advantage Home & Environment Inspections, Inc. (“Advantage”), dated November 15, 2006 and February 2, 2007.¹ Appellants allege that the Advantage reports contained material misstatements of fact and that Advantage knowingly and intentionally delivered said reports to Defendant Matt Currey under circumstances indicating that the misstatements were likely to be relied upon by prospective purchasers of the property. Appellants further allege that all of the Defendants knowingly and intentionally participated in the delivery of the Advantage reports to Appellants with the intention of inducing their reliance in purchasing the property, that they relied on said reports and that they have been damaged as a consequence. Appellants claim that the Defendants made additional false representations in order to conceal their responsibility for the pre-sale misrepresentations contained in the reports. Finally, Appellants claim in the alternative that if the Defendants’ misrepresentations were not done with willful and actual fraud, i.e., done knowingly and intentionally, their misrepresentations were done with constructive fraud based upon a fiduciary and confidential relationship existing between the parties.

After service of the Summons and Complaint upon Appellee on October 4, 2008, Advantage timely filed its *Motion to Dismiss and/or Stay the Claims Asserted by Jim Ennis and Chilton L.*

¹ Said reports were appended to the Complaint as exhibits.

Ennis Against Advantage, Pending Arbitration, pursuant to WVRCivP 12(b)(6) and/or Rule 56 on October 31, 2008 and noted in its pleading that it had been improperly identified in the Complaint as “Sam Woods, dba Advantage Home & Environment Inspections, Inc.”.² Advantage’s Motion to Dismiss and/or Stay asserted that Appellants are required to submit their claims to binding arbitration, given that their claims arise out of their alleged reliance upon the Advantage report which excludes third-party beneficiaries and incorporates an arbitration provision as a condition precedent to civil action.

On November 15, 2006, Advantage was retained by Defendant Matt Currey to perform a visual home inspection of the subject property. See Exhibit 1, Agreement for Visual Home Inspection. Advantage performed a visual inspection and a follow-up visual inspection of the subject property and reports of the inspections were submitted to Mr. Currey. Exhibits 2 and 3. As stated in the report, the reports were confidential, prepared for Mr. Currey exclusively, *and were not to be disclosed to third parties*. Exhibit 1, para. 11 and Exhibit 2, pgs. 2,4,5,6,7,8,9,10,11,12,13,15, and 16. Both of the inspections and the corresponding reports were performed in accordance with the *Agreement for Visual Home Inspection* (“Inspection Agreement”) which was incorporated into and clearly referenced in the report and which contained the confidentiality provisions as well as provisions requiring all disputes arising out of the inspection or corresponding reports to be submitted to binding arbitration. Paragraph 10 of the Inspection Agreement states:

Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract or arising out of, from or related to the Inspection, or

² Advantage Home & Environment Inspections, Inc. and Sam Woods are collectively referred to herein as “Advantage.”

Inspection Report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the Arbitrator appointed thereunder shall be final and binding and judgment on the Award may be entered in any Court of competent jurisdiction.

In accordance with *State of West Virginia ex rel. The Barden and Robeson Corp.*, 539 S.E.2d 106 (W.Va. 2000), which states that West Virginia law recognizes that a contract provision requiring arbitration of disputes creates a condition precedent to any right of action or suit arising under the contract, the Appellants should not be allowed to “cherry-pick” from the report at issue, i.e. choosing aspects of the reports favorable to their position and claiming reliance while ignoring less favorable terms pursuant to which the reports were prepared. Appellants should be required to submit their claims to binding arbitration pursuant to the terms of the Inspection Agreement, particularly in light of Appellants’ alleged reliance upon the inspection reports which were prepared per the terms of the Inspection Agreement. Indeed, Advantage’s Report to Currey specifically excluded third party beneficiaries from reliance on the Report.

On November 4, 2008, Defendants Anderson, Currey, and Currey Realty filed an Answer to the Complaint wherein they asserted a Crossclaim against Advantage, claiming they relied upon the Advantage reports and seeking indemnity should a judgment be rendered in Appellants’ favor against them. That Crossclaim was never served on Advantage. Nevertheless, on February 6, 2009, Advantage filed a similar Motion to Dismiss and/or Stay the claims of Defendants Anderson, Currey, and Currey Realty pending arbitration. This Motion was unopposed, granted and not a subject of this appeal.

On November 18, 2008, Appellants filed a Memorandum in Opposition to Advantage’s

Motion to Dismiss and/or Stay their Claims. Therein, Appellants argued that Advantage's motion should be denied because Appellants were not party to the Inspection Agreement. Appellants cited *United Asphalt Suppliers, Inc. V. Sanders*, 511 S.E.2d 134 (W.Va. 1998) for the legal proposition that "[a] court may not direct a non-signatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the non-signatory exception to the rule requiring express assent to arbitration should be invoked." *See* Syl. Pt. 3, *United, supra*. Appellants further argued that there are issues of fact triable by a jury and that Advantage waived any right to have Appellants' claims arbitrated by failing to assert such a right when Appellants' problems were first brought to its attention.

Finally, on or about May 4, 2009, Appellants filed a Motion to Deem Arbitration to be Waived/Motion to Deem Certain Contractual Provisions Unconscionable. More specifically, Appellants sought to have the one year statute of limitations contained in the Inspection Agreement deemed unconscionable.³ Appellants argued that they were not parties to the contractual agreement containing the arbitration requirement at issue, were never provided a copy of the Inspection Agreement prior to the filing of Advantage's Motion to Dismiss, and that Advantage purposely did not disclose the existence of the arbitration agreement until the filing of its motion to dismiss.

By Order entered July 22, 2009, the Circuit Court stayed the action pending referral to arbitration. The case was not dismissed, nor stricken from the docket. *See Exhibit 4*, Order of July 22, 2009.. Appellants now seek to reverse the Circuit Court's Order staying the Appellants' claims

³ The Inspection Agreement contains a provision requiring all claims to be presented within one year of the date of inspection and provides that Advantage shall have no liability for any claims presented one (1) year after the date of inspection. Appellants cited various opinions of the West Virginia Supreme Court of Appeals and United States District Court for the Southern District of West Virginia in support of their motion.

pending arbitration.

II. STATEMENT OF FACTS

Advantage is a licensed home inspection firm operating from its offices in South Charleston, West Virginia. On or about November 15, 2006, Advantage was retained by Matt Currey, a Defendant in this action, to perform a *visual* home inspection of residential property located at 5216, 85th Street, Cross Lanes, West Virginia. See Agreement for Visual Home Inspection, attached hereto as Exhibit 1. The inspection was done and a report submitted to Mr. Currey. See Exhibit 2. Thereafter, a follow-up inspection of the property was conducted by Advantage and a supplemental report submitted to Mr. Currey on or about February 2, 2007. See Exhibit 3.

Significantly, the Agreement for Visual Home Inspection (“the Contract”), Exhibit 1, pursuant to which Advantage performed all of its services relative to the property at issue, provides, *inter alia*, that:

The inspection and report are performed and prepared for the sole, confidential and exclusive use and possession of the CLIENT. The INSPECTOR accepts no responsibility for use or misinterpretation by third parties.

Contract, paragraph 11, Exhibit 1.

and

Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract or arising out of, from or related to the Inspection, or Inspection Report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the Arbitrator appointed thereunder shall be final and binding and judgment on the Award may be entered in any Court of competent jurisdiction.

Contract, paragraph 10, Exhibit 1.

and

Any claims must be presented within one (1) year of the date of inspection. Advantage Home & Environment Inspections, Inc. shall have no liability for any claims presented one (1) year after the date of inspection;
Contract, paragraph 9, Exhibit 1.

The Complaint alleges that Appellants relied, to their detriment, on the aforementioned visual inspection reports, Exhibits 2 and 3, prepared by Advantage. See Complaint, paragraphs 2 and 3. Notwithstanding Appellants' allegations, the visual inspection report dated November 15, 2006 clearly and unambiguously states that ***"This confidential report is prepared exclusively for Matt Currey"*** (see bottom of each page, Exhibit 2) and incorporates the terms and limitations of the Contract by stating ***"Please also refer to the pre-inspection contract for a detailed explanation of the scope of this inspection."*** See Exhibit 2, pages 5, 7, and 9.

It is clear from the above that the Circuit Court correctly stayed this matter pending arbitration based on the express language of the contracts relied upon by the Appellants.

III. RESPONSE TO ASSIGNMENTS OF ERROR

1. The Circuit Court's Order Staying the Matter Pending Arbitration is Not a "Final Order" and Therefore is Not Appealable.

This Court recently addressed the appealability of orders staying cases pending referral to arbitration in *McGraw v. American Tobacco Co.*, 224 W.Va. 211, 681 S.E.2d 96 (2009).

The *McGraw* Court first noted that "[a]ppellate review generally requires a final decision, which means "a determination that 'puts an end to litigation, . . . leaving nothing more open to dispute and set[ting] controversy at rest.'" 224 W.Va. at 220 (citations omitted).

Indeed, the *McGraw* Court made very clear that:

Where a circuit court directs arbitration of a matter, but does not dismiss the matter from its docket, the order is not final and appealable in reality or effect because there may still be issues needing the attention of the circuit court such as enforcing the arbitration decision or determining the procedural propriety of the arbitration proceedings.

Id. at 221 (citing West's Ann.W.Va.Code, 55-10-3, 55-10-4, 55-10-6, 58-5-1)(emphasis added).

In accordance with the above, this Court can preliminarily dispense with the instant Appeal because the subject Order is not a “final order” that is appealable at this time. Therefore, the Appeal should be denied on that basis alone.

2. The Circuit Court Appropriately Stayed This Action Pending Referral to Arbitration.

Advantage was retained per the Inspection Agreement by Defendant Matt Currey to act on his behalf, as well as Defendant Anderson and Defendant Currey Realty. The Circuit Court correctly determined that the provisions of the Inspection Agreement are applicable to the Appellants’ claims as their claims clearly “arise out of, from, or are related to the inspection and/or inspection reports” at issue and that their claims are thus governed by the arbitration provisions of the Inspection Agreement. The language of the Inspection Agreement clearly and unambiguously mandates that such claims be submitted to binding arbitration.⁴

Appellants argue that they were not parties to the Inspection Agreement, were not provided a copy of the Inspection Agreement prior to the filing of Advantage’s Motion to Dismiss, were not aware of the arbitration provisions contained therein and, under the holding of *United Asphalt*

⁴ Incidentally, the Circuit Court also found that the arbitration agreement binds Defendants Anderson, Currey and Currey Realty. It is important to note that Advantage’s Motion in this regard was unopposed.

Suppliers, Inc. V. Sanders, 511 S.E.2d 134 (W.Va. 1998), should not be compelled to participate in arbitration of their claims because they were not signatories to the Inspection Agreement and there was no “identity of interest” present. Appellants claim that *United* stands for the proposition that a non-signatory to an arbitration agreement can only be required to participate in arbitration under the non-signatory exception when there is an “identity of interest.” An “identity of interest” typically exists between closely related parties, such as affiliated business.⁵

To the contrary, the *United* opinion recognizes that there are instances where a non-signatory to an arbitration clause may be equitably compelled to pursue its claims in arbitration. See *United*, 511 S.E.2d at 138 (citing, *Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530 (M.D.Ala) *aff’d*, 127 F.3d 40 (11th Cir. 1997). *United* further cites *Thomson–CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773 (2nd Cir. 1995), wherein the Second Circuit recognized five theories for binding non-signatories to arbitration agreements. The five recognized theories include: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. See *Thompson* 64 F.3d at 776. In *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir.1988), also cited in *United*, the Fourth Circuit noted that “[t]o decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claims are within the scope of the arbitration clause, regardless of legal label assigned to the claim.” *J.J. Ryan & Sons*, 863 F.2d at 319. The arbitration clause at issue in this matter states:

⁵ *United* involved two businesses owned by the same individual, one which was a signatory to a contract containing an arbitration agreement and the other was not. The *United* opinion makes reference to the Fourth Circuit Court of Appeals holding in the case of *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1998) where affiliated companies were involved.

Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract or arising out of, from or related to the Inspection, or Inspection Report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the Arbitrator appointed thereunder shall be final and binding and judgment on the Award may be entered in any Court of competent jurisdiction.

(Exhibit 1 at ¶ 10)(emphasis added).

It is clear from a review of the Complaint that Appellants' claims sound in fraud. It is further clear that Appellants' claims "arise out of, from, or are related to the inspections" of the subject property and the reports of those inspections dated November 15, 2006, and February 2, 2007. It is also clear that the reports are the linchpin of Appellants' claims of fraud in the inducement to purchase the subject property. Accordingly, the Circuit Court was correct in determining that the arbitration agreement encompasses the scope of claims advanced in the Complaint.

The Circuit Court was further correct in finding that the Appellants can be compelled to pursue their claims in binding arbitration as non-signatories to the Inspection Agreement.

"A court may not direct a non-signatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the non-signatory exception to the rule requiring express assent to arbitration should be invoked."

See Syl. Pt. 3, *United, supra*. Thus, the Circuit Court properly addressed whether there is evidence that would justify the application of the non-signatory exception in order to compel the Appellants to pursue their claims through binding arbitration.

Advantage properly advanced two arguments for application of the non-signatory exception to Appellants' claims:

(1) the Inspection Agreement and its arbitration provisions were *incorporated by reference* into the inspection reports, particularly the November 15, 2006, report wherein it is stated on several pages, **“please also refer to the pre-inspection contract for detailed explanation of the scope of this inspection”**; and,

(2) if Appellants claim to have relied upon the reports, they should not now be allowed to “cherry-pick” their reliance to exclude critical terms and conditions pursuant to which the reports were prepared, i.e., Appellants are *estopped* from avoiding the arbitration provisions of the Inspection Agreement, given their claimed reliance upon the confidential inspection reports.

Both *incorporation by reference* and *estoppel* are theories which support enforcement of an arbitration provision against a non-signatory and were expressly recognized in *Thompson, supra*. In *Thompson*, the court did not find the incorporation by reference exception applicable because it had not been shown that the document containing the arbitration agreement had been incorporated into any document adopted by the non-signatory. *Tompson*, at 777. However, in this instance, the Circuit Court correctly found that the arbitration agreement was incorporated by reference into the inspection reports. The Appellants' claimed reliance upon the reports amounts to an adoption of the

reports by Appellants. By adopting the reports, Appellants had constructive knowledge of the arbitration provisions of the Inspection Agreement.

Moreover, in *Thompson*, the Second Circuit referred to its prior opinion in *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060 (2nd Cir. 1993) wherein it had held that an accounting firm that had knowingly exploited an agreement containing an arbitration requirement was estopped from avoiding arbitration despite having never signed the agreement. *Thompson* at 778. Similarly, in this instance, Appellants have clearly attempted to exploit the confidential reports prepared by Advantage. The fact that the reports were confidential and prepared exclusively for Mr. Currey appears on several pages throughout the November 15, 2006, report. Mr. Currey nevertheless provided these confidential reports to the Appellants who claim, as indicated by their Complaint, exclusive reliance upon them. Without the confidential reports, Appellants would have no claim against Advantage. Thus, Appellants must rely upon the totality of the reports, including the arbitration requirements of the Inspection Agreement under which they were prepared, in order to maintain their claim against Advantage. Accordingly, the Circuit Court properly found that in order to pursue their claims against Advantage, Appellants must pursue their claim in arbitration.⁶

3. The Circuit Court's Order Does Not Violate West Virginia Constitution Art. 3, § 17.

⁶ Appellants initially argued that Advantage waived its right to arbitration by waiting until it filed its Motion to Dismiss before asserting its rights and make issue of the fact that they were not provided a copy of the Inspection Agreement containing the arbitration provisions at the time Mr. Currey provided the reports to Appellants.

The Court did not find the authority cited by Appellants persuasive on the issue and found that Advantage was timely in asserting its right to arbitrate Appellants' claims. No "claim" was asserted against Advantage until the filing of the Complaint. Upon being served with Appellants' Complaint, Advantage immediately sought to enforce the arbitration requirements of the Inspection Agreement.

The Court further found that the arbitration requirements and one year limitations period contained in the Inspection Agreement were not unconscionable at the time the Inspection Agreement was entered by Defendant Matt Currey as claimed by Appellants. This finding was not appealed by the Appellants.

Without argument or explanation, Appellants assert that the Circuit Court's Order violates the West Virginia Constitution Art. 3, § 17. Importantly, however, the Appellants were never denied access to the Court. Indeed, a review of the record below speaks to the contrary: the Appellants were given an opportunity to plead their civil claims and likewise had a full opportunity to be heard before the Circuit Court stayed the case pending arbitration. It appears that the Appellants believe that a constitutional violation occurs every time one party "loses" an argument. That position, of course, is meritless. *See, e.g. Gibson v. West Virginia Dept. of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991)(statute of repose does not violate Const. Art. 3, § 17); *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977)(notice of claim requirement does not violate Const. Art. 3, § 17); *Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991)(statutory \$1 million cap does not violate Const. Art. 3, § 17). The Appellants' substantive due process has clearly been preserved. Accordingly, Appellants' constitutional challenge to the Circuit Court's Order staying the proceeding pending arbitration fails.

IV. CONCLUSION

The Circuit Court correctly stayed the instant action pending arbitration in light of the binding arbitration clause contained in the documents upon which the Appellants rely in asserting liability.

Appellants have at no time been prohibited from prosecuting their claims against the Anderson\Currey defendants, leaving the Anderson\Currey defendants to pursue what claim they may have against Appellee in arbitration, a forum indisputably binding upon the Anderson\Currey defendants.

Accordingly, the Appellee herein and Defendant below, Advantage, respectfully requests that this Court enter an Order denying the relief sought by Appellants and granting such other and further relief as this Court deems appropriate under the circumstances.

**ADVANTAGE HOME & ENVIRONMENT
INSPECTIONS, INC.**

By Counsel

A handwritten signature in black ink, appearing to read 'D. Moore', written over a horizontal line.

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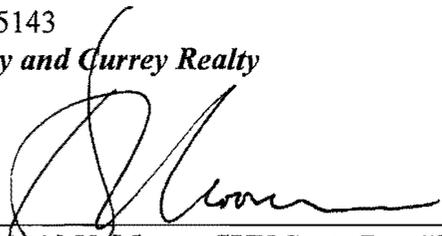
Appellee/Defendant Below.

CERTIFICATE OF SERVICE

I, David V. Moore, counsel for Appellant Advantage Home & Environment Inspections, Inc., do hereby certify that on the 20th day of August, 2010, I served a true and exact copy of the foregoing *Response Brief of Appellee, Advantage Home and Environment Inspections, Inc.* upon the following counsel of record by depositing the same in the United States mail, with postage prepaid, addressed as follows:

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EXHIBITS

ON

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